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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ORGANIZACION JD LTDA., and MANUFACTURAS JD LTDA.,

Petitioners,

vs.

UNITED STATES OF AMERCIA, THE DRUG ENFORCEMENT ADMINISTRATION, BANCO ATLANTICO, and THE BANK OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Isidoro Rodriguez, Esq.
Attorney for Petitioners

Law Offices of Isidoro Rodriguez, P.C.
Calle 84 No. 56-51
Second Floor, Suite 4
Barranquilla, Colombia
(011)5758-561678/ 458273

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THIS COURT SHOULD EXERCISE ITS SUPERVISORY AUTHORITY, TO REVIEW AND REVERSE JUDGE WEINSTEIN'S DISREGARDING ON SEPTEMBER 9, 1992, THE ENTERED FINAL ORDERS OF FEBRUARY 21, 1991, AND AUGUST 5, 1992, IN BOLD DEFIANCE OF THE PROVISIONS OF RULE 60(B) OF THE FEDERAL RULES OF CIVIL PROCEDURE, SO TO PERMIT A HAND DRAFTED INTERNAL REVENUE SERVICE JEOPARDY LEVY TO AGAIN SEIZE THE FUNDS TO BE RELEASED TO ORGANIZACION JD LTDA. AND MANUFACTURAS JD LTDA.?

II. WHETHER THE SECOND CIRCUIT ERRED IN USING THE LIMITED 1968 DEFINITION OF "INTERCEPT," SO TO DISREGARD THE EXPANDED NEW AMENDED DEFINITION IN THE ELECTRONIC COMMUNICATION PRIVACY ACT OF 1986, 18 U.S.C. § 2510(4) AND (5), WHICH WERE SPECIFICALLY ENACTED BY CONGRESS TO PROTECT ELECTRONIC FUND TRANSFER COMMUNICATIONS IN TRANSIT?

III. WHETHER ORGANIZACION JD LTDA. AND MANUFACTURAS JD LTDA., HAVE STATED A CLAIM FOR DAMAGES UNDER 18 U.S.C. § 2520, AGAINST THE UNITED STATES, THE DRUG ENFORCEMENT ADMINISTRATION, BANCO ATLANTICO AND THE BANK OF NEW YORK, BECAUSE WITHOUT THE JUDICIAL AUTHORITY REQUIRED BY 18 U.S.C. § 2516(3), THESE ENTITIES HAVE ADMITTED PROGRAMMING "STOP QUES" IN THESE COMMUNICATION SERVICE PROVIDERS COMPUTER MODEM DE-

VICES SO TO OBTAIN ACCESS TO THE INFORMATION IN ALL THE THIRD PARTY ELECTRONIC FUND TRANSFER COMMUNICATIONS IN TRANSIT TO THE REPUBLIC OF COLOMBIA BETWEEN JULY 16, THROUGH AUGUST 26, 1990, PURSUANT TO VERBAL ORDERS, A GENERAL IN REM WARRANT, AND A GENERAL DEA ADMINISTRATIVE SUBPOENA?

IV. WHETHER UNDER 18 U.S.C. § 2707, ORGANIZACION JD LTDA. AND MANUFACTURAS JD LTDA., HAVE STATED A CLAIM FOR DAMAGES BECAUSE WITHOUT A WARRANT ISSUED UNDER THE FEDERAL RULES OF CRIMINAL PROCEDURE REQUIRED UNDER 18 U.S.C. § 2703(a), THEIR ELECTRONIC COMMUNICATION INFORMATION STORED IN THESE COMMUNICATION SERVICE PROVIDERS COMPUTERS WERE ADMITTEDLY DISCLOSED TO THE UNITED STATES BECAUSE OF VERBAL ORDERS, A GENERAL IN REM WARRANT, AND A GENERAL DEA ADMINISTRATIVE SUBPOENA?

V. WHETHER ORGANIZACION JD LTDA. AND MANUFACTURAS JD LTDA., HAVE A STATED A CLAIM FOR DAMAGES UNDER THE RIGHT TO FINANCIAL PRIVACY ACT OF 1978, 12 U.S.C. § 3403(a), BECAUSE OF THE UNAUTHORIZED DISCLOSURE THEIR FINANCIAL INFORMATION STORED IN "STOP QUE" ACCOUNTS ESTABLISHED IN THEIR NAME; AND THE FINANCIAL INSTITUTIONS WERE COMPENSATED UNDER SAID ACT?

LIST OF PARTIES

In accordance Rule 11 and Rule 12.2 of the Rules of the Supreme Court of the United States, this petition seeks review on a writ of certiorari to the United States Court of Appeals for the Second Circuit of:

(i) the Second Circuit's final decision in United States v. Merrill Lynch Bank, ___ F. 2d. ___, Docket No. 92-6229 (September 10, 1993); and,

(ii) the related pending appeal in the Second Circuit, Organizacion JD Ltda., and Manufacturas JD Ltda. v. United States Department of Justice, The Drug Enforcement Administration, Banco Atlantico, S.A. and the Bank of New York, Civil Action 92-3690 (December 2, 1992), 2d Cir. Docket No. 93-6019, in which no judgement has been entered

although involving identical facts and similar statutory claims for damages which have already been denied in the above final decision.

The parties that have appeared in these two cases included those listed on the case caption.

As to the former of these actions which is a Government initiated civil forfeiture case, the parties below also included Creaciones Viviana Ltda., Comercial Estrella Ltda., Confecciones y Tejidos Nacionales Ltda., Manufacturas del Atlantico Ltda., Abuchaibe Hnos. Ltda., Comercial Samora Ltda., Manufacturas Internacionales Ltda., Industrias Marathon Ltda., Manufacturas de Moda Ltda; Incolco Ltda; Creaciones Karen Ltda; Tote Export Manufacturas Ltda;

Creaciones Ivonne Ltda.; Confecciones Zuny Ltda., and Valery Fashions Ltda.

Neither Organizacion JD Ltda., nor Manufacturas JD Ltda., have either parent companies or subsidiary companies.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW . . i

LIST OF PARTIES iii

TABLE OF AUTHORITIES ix

CITATIONS TO OPINIONS BELOW 5

STATEMENT OF JURISDICTION 7

STATUTES INVOLVED 8

THE ELECTRONIC COMMUNICATIONS PRIVACY ACT OF 1986 8

THE RIGHT TO FINANCIAL PRIVACY ACT OF 1978 12

RULE 60(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE 13

STATEMENT OF THE CASE 14

A. JURISDICTION BELOW . . . 14

B. RELEVANT FACTS 14

REASONS FOR GRANTING THE WRIT . . 29

I. BECAUSE THE LOWER COURT LACKED AUTHORITY TO IGNORE THE TWO ENTERED FINAL ORDERS IN THE ALL FUNDS CASE, AND TO DISREGARD THE REQUIREMENTS OF RULE 60(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE, THE COURT SHOULD EXERCISE ITS POWER OF

SUPERVISION TO ORDER COMPLIANCE WITH THE FINAL ORDER AS ENTERED. 29

II. REVIEW BY THIS COURT IS SOUGHT BECAUSE THE SECOND CIRCUIT'S DECISION TO USE THE OLD 1968 DEFINITION OF "INTERCEPT" IN THE ALL FUNDS CASE, AND ITS FAILURE TO RENDER A DECISION IN THE INTERMEDIARY BANK CASE, HAVE DENIED THE LIMITED PARTNERSHIPS THEIR RIGHT TO RECEIVE DAMAGES FOR THE UNAUTHORIZED PROGRAMMING OF "STOP QUES" IN COMPUTER MODEMS, IN VIOLATION OF THE MANDATES OF CONGRESS IN THE ELECTRONIC COMMUNICATION PRIVACY ACT OF 1986 34

III. REVIEW BY THIS COURT IS SOUGHT BECAUSE THE SECOND CIRCUIT'S DECISION IN THE ALL FUNDS CASE, AND ITS FAILURE TO RENDER A DECISION IN THE INTERMEDIARY BANK CASE, HAVE DENIED THE LIMITED PARTNERSHIPS THEIR RIGHT TO RECEIVE DAMAGES UNDER THE RIGHT TO FINANCIAL PRIVACY ACT OF 1978. 51

IV. THE INTERMEDIARY BANK CASE APPEAL OF THE DENIAL OF THE LIMITED PARTNERSHIPS' RIGHT TO DAMAGES WARRANTS REVIEW AT THIS TIME BECAUSE THE SECOND CIRCUIT HAS ALREADY DECIDED IN THE ALL FUNDS CASE TO CONDONE THE UNITED STATES AND INTERME-

DIARY BANKS' DISREGARD OF THE PROVISIONS OF THE ELECTRONIC COMMUNICATION PRIVACY ACT AND RIGHT TO FINANCIAL PRIVACY ACT 53

CONCLUSION 56

TABLE OF AUTHORITIES

Cases:

Rixon, Inc. v. Racal-Milgo, Inc., D.C. Del, 551 F.Supp. 163, 169 40

Smith v. Maryland, 442 U.S. 735 (1979) 36

United States vs. A Parcel of Land, Building, Appurtenances and Improvements, Known as 92 Buena Vista Avenue, Rumson, New Jersey, Et. Al., 113 S.Ct 1126, 1993 WL 44241 (U.S. Feb. 24, 1993) 45

United States v. Kaufman, 267 U.S. 408, 69 L.Ed 685, 45 S.Ct. 322 32

United States v. Matlock, 415 U.S. 164 (1974) 36

United States v Merrill Lynch Bank, __ F.2d. __, Docket No. 92-6229 (September 10, 1993) . . . 31, 32, 34, 39, 40, 44, 46, 50, 51

United States v. Miller, 425 U.S. 435 (1976) 36

United States v. Toys of World Club, Inc., 288 F.2d 89, 94 ALR 739 (2nd Cir. 1978) 32

Constitution, Statutes, and Rules:

Fourth Amendment of the United States Constitution 35

The Right to Financial Privacy Act, 12 U.S.C. § 3403 51

12 U.S.C. § 3403(a)26, 59

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 et seq. 36

Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510 et seq., and §§ 2701 et seq. 37, 42

18 U.S.C. 2510(4) . . 16, 40, 41,47, 58

18 U.S.C. 2510(5) 16, 58

18 U.S.C. § 2511(1)(a) 38, 41, 47, 58

18 U.S.C. § 2511(1)(c) 48, 38

18 U.S.C. § 2511(3)(a) 38, 48

18 U.S.C. §2516(3) . . . 42-44, 47, 49 53, 58

18 U.S.C. § 2518 58

18 U.S.C. § 2520 49

18 U.S.C. § 2702(a) 39, 41, 48

18 U.S.C. § 2703(a) 38, 42, 47 53, 59

The Internal Revenue Code, 26 U.S.C. § 6331 32

26 U.S.C. § 6331(d)(3) 24

26 U.S.C. § 6861(a) 31

26 U.S.C. § 7429(a) 24, 31

26 U.S.C.§ 6331 (a) and (d)(3) . . 31

Federal Communications Act of 1934, 47 U.S.C. § 605 (1988) 38

Rule 60(b) of the Federal Rules of Civil Procedure 29, 30

Legislative History:

Electronics Communications Privacy Act of 1986, Senate Report No. 99-541, October 17, 1986 . . . . . 34, 35, 43, 54

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Note, Search Warrants and Computer Records, 67 B.U.L. Rev. 179 (1987) . 37

Section 101(7) of the Uniform Limited Partnership Act 52

Vol 27, Words and Phrases, Permanent Edition, West Pub. 1989 Supp . . . 40

No._____

IN THE
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OCTOBER TERM, 1993

Organizacion JD Ltda., and Manufacturas JD Ltda.,

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v.

United States of America, The Drug Enforcement Administration, Banco Atlantico, and The Bank of New York,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Although Organizacion JD Ltda., and Manufacturas JD Ltda. (hereinafter "Limited Partnerships"),[1] have in their

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[1]The Limited Partnerships are owned by three persons, fabricate and export finished clothing from Barranquilla, Republic of Colombia, are incorporated under that country's Civil Code, and

favor two final judgments entered on February 21, 1991, and August 5, 1992, in United States v. Merrill Lynch Bank, 801 F.Supp 984 (1992), ___ F. 2d. ___, Docket No. 92-6229 (September 10, 1993) (hereinafter "All Funds Case"),[2] the Limited Partnerships have neither obtained possession of over $326,000.00, found to be their sole nonforfeitable property, nor have they been able to obtain damages for the unauthorized interception and disclosure of their electronic communications.

In the All Funds Case, where a final decision has been rendered, this Petition for Writ of Certiorari seeks

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have never conducted any commercial activity in the United States.

[2]"App. " references are to the section and page number in the Appendix. "Lod. " references are to the page number in the Lodging filed and submitted with this Petition.

review of the denial of the Limited Partnerships' claim for damages, and the lower court's disregarding two final entered orders without complying with Rule 60(b), so to permit the execution of a hand drafted Internal Revenue Service jeopardy levy.

Furthermore a Petition for Writ of Certiorari is sought to review Organizacion JD Ltda. and Manufacturas JD Ltda. v. United States Department of Justice, The Drug Enforcement Administration, Banco Atlantico, S.A., and The Bank of New York, Sec. Cir. Docket No. 93-6019 (hereinafter the "Intermediary Bank Case"), because the United States Court of Appeals for the Second Circuit has failed to issue a final decision although having already overruled Judge Jack B. Weinstein's use of the relation

back doctrine to bar a claim for violations of the Electronic Communications Privacy Act, 18 U.S.C. § 2510 et seq. and § 2701 et seq.

Therefore because Congress passed specific legislation permitting a claim for damages due to the unauthorized procuring of the access to electronic communication in transit and in computer storage, as well as for the unauthorized disclosure; and given that in the All Funds Case the Second Circuit ignored the prohibitions against unauthorized disclosure, 18 U.S.C. § 2511(1)(a), (c), and (3)(a), § 2516(3), and § 2703(a); as well as 12 U.S.C. § 3417, the Limited Partnerships pray that a writ of certiorari be issued so that this Court can provide discretionary supervisory review

of the Intermediary Bank Case and the All Funds Case appeals.

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the Eastern District in the All Funds Case at App. 1a, is reported at 801 F. Supp. 984 (E.D.N.Y).

The opinion of the Court of Appeals in the All Funds Case, not yet reported, is reproduced in the separately bonded appendix to this petition at App. 1b.

The Order Denying the Petition for Rehearing dated October 6, 1993, is reproduced at App. 1c.

The following relevant unreported Orders are also reproduced: the March 13, 1991, order dismissing the in rem complaint against Johnny Daccarett (Lod. 13); the February 6, 1992, order staying all depositions of the Banco Atlantico

and The Bank of New York (Lod. 18); the February 11, 1992, order endorsed by Judge Weinstein, denying the deposition of Messrs. Hui and Brown (Lod. 19); the February 18, 1992, order stopping only the discovery of the United States and the Intermediary Banks (Lod. 20); the April 2, 1992, order denying Petitioners' motions to compel discovery and dismissing all counterclaims against the United States (Lod. 21); the September 9, 1992, Supplemental Order directing compliance with the Internal Revenue Service hand drafted jeopardy levy (Lod. 22).

The unreported opinion of the District Court for the Eastern District of New York in the Intermediary Bank Case is reproduced at App. 1d.

The opinion of the United States District Court for the Eastern District in the Consolidated Bank Case, at App. 1e, is reported at 792 F. Supp. 180 (1992) appeal pending.

STATEMENT OF JURISDICTION

The Second Circuit issued its opinion in the All Funds Case on September 10, 1993. It denied a petition for rehearing on October 6, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

In the Intermediary Bank Case, where no judgment has been issued, the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and § 2101(e).

STATUTES INVOLVED
THE ELECTRONIC COMMUNICATIONS PRIVACY ACT OF 1986

18 U.S.C. § 2510:

(4) "intercept" means the aural or other acquisition of the contents of any . . . electronic . . . communication through the use of any electronic, mechanical, or other device;

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a . . . electronic communication . . . .

(12) "electronic communication" means any transfer of . . . intelligence of any nature transmitted in whole or in part by wire . . . that affects interstate or foreign commerce, ...

(15) "electronic communication service" means any service which provides to users thereof the ability to send or receive . . . electronic communication.

(17) "electronic storage" means-

(A) any temporary, intermediate storage of a . . . electronic communication incidental to the electronic transmission thereof; and

(B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication; . . .

18 U.S.C. § 2511(1)(a):

(1) Except as otherwise specifically provided in this chapter any person who-

(a) intentionally intercepts,. . . , or procures any other person to intercept . . . , any . . . electronic communication;

(b) intentionally discloses, . . . to any person the contents of any . . . electronic communication, knowing or having reason to know that the information was obtained through interception of . . . electronic communication in violation of this subsection . . . shall be punished as in subsection (4) or shall be subject to suit as provided in subsection (5).

18 U.S.C. § 2511(3)(a):

Except as provided in paragraph (b) of this subsection, a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication (other than one to such person or entity, or agent thereof) while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient.

18 U.S.C. § 2516(3):

Any attorney for the Government (as such term is defined for the purposes of the Federal Rules of Criminal Procedure)

may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant, in conformity with section 2518 of this title, or order authorizing or approving the interception of electronic communication by an investigative or law enforcement officer having responsibility for the investigation of the offense as to which the application is made when such interception may provide or has provided evidence of any Federal felony.

18 U.S.C. § 2520:

(a) **In general.**-Except as provided in section 2511(2)(a)(ii), any person whose . . . electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief may be appropriate.

18 U.S.C. § 2702(a):

Prohibitions.- Except as provided in subsection (b)-(1) a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service;. . .

18 U.S.C. § 2703:

REQUIREMENTS OF GOVERNMENT ACCESS.

(a) **Contents of electronic communications in electronic storage.**- A Government entity may require the disclo-

sure by a provider of electronic communication service of the contents of an electronic communication, that is in electronic storage in an electronic communication system for one hundred and eighty days or less, only pursuant to a warrant issued under the Federal Rules of Criminal Procedures or equivalent State warrant. A government entity may require the disclosure by a provider of electronic communication service of the contents of an electronic communication system for more than one hundred and eighty days by the means available under subsection (b) of this section.

(b) **Contents of electronic communications in a remote computing service.**- (1) A government entity may require a provider of remote computing service to disclose the contents of any electronic communication to which this paragraph is made applicable by paragraph (2) of this section-

(A) without required notice to the subscriber or customer, if the government entity obtains a warrant issued under the Federal Rules of Criminal Procedure or equivalent State warrant; or

(B) with prior notice from the government entity to the subscriber or customer if the government entity-

(i) uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena; or

> (ii) obtains a court order for such disclosure under subsection (d) of this section;

except that delayed notice may be given pursuant to section 2705 of this title.

18 U.S.C. § 2707:

(a) **Cause of action**- Except as provided in section 2703(e), any . . . customer aggrieved by any violation of this chapter in which the conduct constituting the violation is engaged in with a knowing or intentional state of mind may, in a civil action, recover from the person or entity which engaged in that violation such relief as may be appropriate.

THE RIGHT TO FINANCIAL PRIVACY ACT OF 1978

12 U.S.C. § 3401:

(4) "person" means an individual or a partnership of five or fewer individuals;

(5) "customer" means any person or authorized representative of that person who utilized or is utilizing any service of a financial institution, or for whom a financial institution is acting or has acted as a fiduciary, in relation to an account maintained in the person's name.

12 U.S.C. § 3403:

(a) Release of records by financial institutions prohibited

No financial institution, or officer, employee, or agent or a financial institution, may provide to any Government authority access to or copies of, or the information contained in, the financial records of any customer except in accordance with the provisions of this chapter.

RULE 60(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgement, order, or proceeding for the following reasons . . . . The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgement, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgement or suspend its operation. . . .

STATEMENT OF THE CASE

A. JURISDICTION BELOW

In both the All Funds Case and the Intermediary Bank Case, the Limited Partnerships filed claims for damages based upon the provisions of 18 U.S.C. § 2510(9)(a), § 2520, and § 2710(c)(1); 12 U.S.C. § 3416; 28 U.S.C. § 1332(a)(1), § 2201 and § 2202.

Appellate jurisdiction is invoked pursuant to 28 U.S.C. 1291.

B. RELEVANT FACTS

On July 13, 1990, Assistant United States Attorneys for the Eastern District of New York, Mr. Arthur P. Hui and Mr. Gary R. Brown (hereinafter Messrs. Hui and Brown), ordered the distribution of copies of a general civil in rem warrant and complaint to all interme-

diary banks[3] in the greater New York area.

This general warrant sought only the seizure of a bank account at Merrill Lynch in Columbus Ohio, and did not mention the Limited Partnerships (Lod. 1).

On July 17, 1990, following the distribution of this general in rem warrant, and the resulting disclosure of protected financial information, Messrs. Hui and Brown, issued verbal telephone orders to the Intermediary Banks to procure the collaboration of these financial institutions in their capacity as electronic communication service provid-

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[3]All domestic and international electronic fund transfer communication must pass through a sender bank, various intermediary banks, and a beneficiary bank. They provide a service to the public, as part of the FEDWIRE, SWIFT, and CHIPS, world-wide electronic communication fund transfer systems. Electronic fund transfers amount to over 1 trillion dollars daily transferred world-wide.

ers within the Fedwire, SWIFT, and CHIPS electronic communication systems.

Based on these verbal instructions of Messrs. Hui and Brown, the Intermediary Banks admitted to knowingly inserting "stop ques" in their respective computer communication modem devices so to intercept[4] all electronic funds transfer communications in transit going to any third party beneficiary in the Republic of Colombia (Lod. 15 and Lod. 18).

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[4]Although the term "freeze," was used by both the Intermediary Banks in their explanation of their handling of the electronic communication, and by the Second Circuit in their decision in the All Funds Case; research of the term "freeze," confirms that it has no meaning in the context of electronic communication technology.

Based on the admitted facts that there were repeated procuring of access to electronic communications in transit through the programming of "stop ques" in the Intermediary Banks modem devices, the requirements of the definition of "intercept" in 18 U.S.C. 2510(4), as amended by Congress, were satisfied. See 18 U.S.C. 2510(5). Thus term "intercept" will be used, and not "freeze".

Once the programmed "stop ques" had intercepted the electronic communication, and the messages were placed in computer storage, the Intermediary Banks knowingly failed to comply with the instructions contained in the intercepted electronic funds transfer communications.[5]

In meetings on August 13, 1990, it was admitted by both the United States and the Intermediary Banks that no judicial authority, as required under 18 U.S.C. § 2516(3), was sought authorizing the programming of the "stop que" in the

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[5]Since all discovery was denied, the exact number of electronic funds transfers communications intercepted in transit to the Republic of Colombia is not known. However, it is known that the Intermediary Banks neither notified the sender, the Federal Reserve, the beneficiary bank, nor any third party beneficiaries in the Republic of Colombia, that they would not comply with the instructions contained in the intercepted electronic fund transfer communications, as required by regulations of the Federal Reserve, and their agreement as part of the FEDWIRE, SWIFT and CHIPS electronic communication systems.

Intermediary Banks computer communication modem devices so to obtain access of the electronic communications going to the Republic of Colombia.

Subsequently on July 20, 1990, to seek electronic communication information in computer storage at the Intermediary Banks a Third Amended In Rem Complaint (Lod. 2), and a general DEA administrative subpoena (Lod. 3), were issued and served on Banco Atlantico, but never served on the Bank of New York, in clear violation of 18 U.S.C. § 2703(a).

Thereafter based only on the verbal orders of Messrs. Hui and Brown,[6] three electronic fund transfers belonging to the Limited Partnerships were intercept-

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[6]Neither the general in rem warrants, nor the general DEA subpoenas issued cited the name of the Limited Partnerships or Mr. Daccarett.

ed due to the programming of "stop ques:"

(i) on July 24, 1990, Organizacion JD Ltda., through Banco Atlantico, for $98,800.00 (Lod. 4);

(ii) on July 26, 1990, to Organizacion JD Ltda. (Lod. 6), through Bank of New York, for $98,000.00; and,

(iii) on July 26, 1990, to Manufacturas JD Ltda., through Banco Atlantico, for $98,991.00 (Lod. 7).

These in transit electronic communications were placed in computer storage at the Intermediary Bank, and then disclosed to the United States, to await further instructions from Messrs. Hui and Brown.

On August 8, 1990, two weeks after the procuring of the interception of the three electronic communications based

only on the verbal order of Messrs. Hui and Brown, a Seventh Amended In Rem Complaint in which the Limited Partnerships were named was executed on the Bank of New York (Lod. 9); and Banco Atlantico (Lod. 10). Also on the same date a DEA administrative subpoena naming the Limited Partnerships was served on The Bank of New York and Banco Atlantico (Lod. 11).

In August, 1990, the Limited Partnerships, and Mr. Johnny Daccarett, as then chief operating officer, filed verified claims.

On February 21, 1991, Judge Weinstein dismissed the Seventh in rem complaint against Mr. Daccarett due to the failure of the United States to demonstrate that any electronic communication

belonging to him personally had been seized (Lod. 13).

In June, 1991, under the authority of the Right to Financial Privacy Act of 1978, the Intermediary Banks applied for and were compensated for their costs relating to their collaboration with the United States (Lod. 14).

On July 18, 1991, Manufacturas Internacional, Ltda. v. Manufacturers Hanover Trust Co., and Consolidated Cases, 792 F. Supp. 180 (February 27, 1992), appeal pending, 2nd Cir. Docket No. 92-7360 (hereinafter the "Consolidated Bank Case")[7], was filed.

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[7]Ten separate actions were filed in the Southern District of New York based on the transmit date of each distinct electronic communication belonging to Creaciones Viviana Ltda., Comercial Estrella Ltda., Confecciones y Tejidos Nacionales Ltda., Manufacturas del Atlantico Ltda., Abuchaibe Hnos. Ltda., Comercial Samora Ltda., Manufacturas Internacionales Ltda. and Industrias Marathon Ltda. Although motions in opposition were filed, the cases were consolidat-

From November, 1990, through March, 1992, during attempted discovery of the United States and the Intermediary Banks in the All Funds Case, Judge Weinstein first granted an ex parte stay to the United States from all discovery for over eight months; and then when the stay was lifted, denied discovery of both the United States, and the Intermediary Banks (Lod. 20 and 21)

On February 22, 1992, after also barring all discovery in the Consolidated Bank Case Judge Weinstein granted

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ed and transferred to Judge Weinstein. At the outset, based on the relation back doctrine all discovery on the collaboration between Intermediary Banks and the United States was denied by Judge Weinstein. Despite the Stipulation of the parties the Second Circuit has refused repeated attempts to reinstate this appeal.

the Intermediary Banks' Motion for Summary Judgment.[8]

On March 3, 1992, one day before the start of the two month jury trial in the All Funds Case, Judge Weinstein dismissed the claims against the United States based on his holding in the Consolidated Bank Cases.

On May 8, 1992, after the two month jury trial the Limited Partnerships' funds were found to be not subject to forfeiture (App. 34a through 36a).

On July 29, 1992, seventeen months after the claim of Mr. Johnny Daccarett had been dismissed on February 21, 1991,

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[8]The claim for violation under the Electronic Communications Privacy Act was dismissed based on the relation-back doctrine (App. 22e through 31e; and App. 36e through 55e), and the claim under Right to Financial Privacy Act, because the Court found, although permitting no discovery on the issue, that no "account" was held in the name of the intended beneficiary of the electronic funds transfer (App. 31e through 36e).

Messrs. Arthur P. Hui, Gary R. Brown, and Assistant United States Attorney Jennifer Boal, served a hand drafted Internal Revenue Service jeopardy levy Notice of Levy on Judge Weinstein and the Clerk of the Court, seeking to seize again the funds of the Limited Partnerships based on their allegation that the Limited Partnerships were the alter ego, or nominee of the former Claimant Mr. Johnny Daccarett.

The hand drafted levy was issued without any notice ever being served on the Mr. Daccarett. Furthermore neither were any "findings" ever made, nor any written statement issued, as required by 26 U.S.C. § 6331(d)(3), and § 7429(a).

Although having received a copy of the hand drafted levy of July 29, 1992, Judge Weinstein issued his final order

in the All Funds Case on August 5, 1992, finding the reasons to release immediately the funds belonging to the Limited Partnerships in accordance with the jury verdict to be overwhelming.[9]

The Limited Partnerships filed the Intermediary Bank Case, on August 5, 1992, against the Intermediary Banks, seeking damages: (a) for the violation of 18 U.S.C. § 2511(1)(a) & (3)(a), due to United States and Intermediary Banks' collaboration in the unauthorized pro-

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[9]Judge Weinstein confirmed the final order entered on February 21, 1992, which dismissed the claim of Mr. Daccarett, and stated:

> "... in this case no credible evidence has been submitted demonstrating that [Mr. Daccarett] controls any claimant or that he will receive the benefit of proceeds returned to a claimant. Nor is there any evidence to suggest that Daccarett is flouting the judicial system in this forfeiture case.... It is the claimant corporations, Manufacturas JD and Organizacion JD, which prevailed at trial--not Johnny Daccarett. The government has shown no persuasive reason to bar the corporate claimant from receiving their funds...." Id. at App. 63a-65a.

gramming of "stop ques" so to intercept all electronic funds transfer communications in transit to the Republic of Colombia; (b) for the violation of 18 U.S.C. § 2702(a) due to the unauthorized disclosure of information in computer storage of the in transit electronic fund transfers communication; (c) for the violation 18 U.S.C. § 2703(a) due to the unauthorized disclosure and divulging of information in computer storage of previous electronic fund transfers that had been transmitted to the Republic of Colombia; and, (d) for the violation of 12 U.S.C. § 3403(a), for the intentional and knowing divulging of information to the United States by the Intermediary Banks after having established "stop que" accounts in the Limited Partnerships' name.

On August 14, 1992, the United States filed a motion under Rule 60(a) F.R.C.P., seeking correction of a clerical error in the final order and the execution of the hand drafted Notice of Levy.

On September 9, 1992, Judge Weinstein refused to comply with the requirements of Rule 60 F.R.C.P., and directed the hand drafted levy be complied with (Lod. 22).

On September 28, 1992, the Second Circuit denied a Motion to Stay Judge Weinstein's groundless disregard of Rule 60 F.R.C.P. The Second Circuit combined the Limited Partnerships separately filed Notice of Appeal, with that of the Notice of Appeal of the non-prevailing claimants in the All Funds Case.

In the Intermediary Banks Case, in November, 1992, the Intermediary Banks and the United States submitted affidavits in support of their motions for Summary Judgement admitting that the "stop ques" were programmed in the computer modem devices based on the above facts, but stated as a matter of law relief could not be granted.

On December 2, 1992, without permitting discovery on the unauthorized procuring of the interception and disclosure of the electronic fund transfer communications of the Limited Partnerships, and despite the admissions of the Government and the Intermediary Bank, Judge Weinstein granted summary judgement in the Intermediary Bank Case, based on his relation back holding in the Consolidated Bank Case.

REASONS FOR GRANTING THE WRIT

I. **BECAUSE THE LOWER COURT LACKED AUTHORITY TO IGNORE THE TWO ENTERED FINAL ORDERS IN THE ALL FUNDS CASE, AND TO DISREGARD THE REQUIREMENTS OF RULE 60(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE, THE COURT SHOULD EXERCISE ITS POWER OF SUPERVISION TO ORDER COMPLIANCE WITH THE FINAL ORDER AS ENTERED.**

The Limited Partnerships seek the supervisory authority of this Court to assure that there is compliance with the concept of "finality" incorporated in Rule 60(b) of the Federal Rules of Civil Procedure (hereinafter "Rule 60(b)"),[10]

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[10]When the Supreme Court's Advisory Committee was originally formulating the Federal Rules of Civil Procedures in 1938, Rule 60(b) was adopted after ". . . the Committee carefully considered the problem of finality, its general desirability, and its relationship to a number of rules. . . ." Moore's Federal Practice, 2nd Edition, Vol. 7, ¶ 60.09, p. 60-65.

In 1946, at the same time that the Supreme Court's Advisory Committee was correcting deficiencies in Rule 60(b), by increasing from 1 to 6 the reasons a District Court could grant relief from its final entered order, "the Committee buttressed finality by providing that the periods of time for making motions under Rules 50, 52 and 59, which destroy the finality of a judgment for

so that the final decisions issued and entered on February 21, 1991, and August 5, 1992, in the All Funds Case, are not arbitrarily and subjectively changed by the lower court when it is without authority to do so.[11]

On September 9, 1992, Judge Weinstein boldly refused to comply with Rule 60(b) F.R.C.P., prior to changing a final entered orders, and thus His Honor was without authority to order that the defective hand drafted levy,[12] be fol-

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purposes of appeal could not be enlarged; that the continued existence of the term of court gives the district court no added power over its judgment; and that any maximum time period stated in Rule 60 is not subject to enlargement." Id. Vol. 7, ¶ 60.18[1], p. 60-130.

[11]Under Rule 60(b) F.R.C.P., "[a] motion under this subdivision (b) does not affect the finality of a judgement or suspend its operation," thus Judge Weinstein was without power to amend the final entered orders.

[12]The hand drafted levy was invalid because: in violation of 26 U.S.C. § 6861(a), it was issued without notice, demand, and prior to any assessment or jeopardy assessment being made; in

lowed so to again permit the United States take the property of the Limited Partnerships and their attorney of record (Lod. 22).

In the All Funds Case, Judge Weinstein was without authority since two final orders on February 21, 1991, (Lod. 13), and August 5, 1992, had been entered deciding that the seized funds belonged to the Limited Partnerships.[13]

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violation of 26 U.S.C.§ 6331 (a) and (d)(3), it was issued without notice and finding; and in violation of 26 U.S.C. § 7429(a), it was never justified.

[13]A wrongful levy, unauthorized collection, and writ of mandamus action was filed by the Limited Partnerships on February 18, 1993, Organizacion JD Ltda. et al. v. Commissioner of I.R.S., et al., CV-93-0745 (E.D.N.Y., Weinstein, J.). This Court has held that it is apparent from the terms of 26 U.S.C. § 6331, creating the right of the federal tax lien upon which a jeopardy assessment and levy are based, that the federal lien can only be imposed on the property rights to property "belonging" to a person liable to pay the federal tax, and does not extend to the property or interests of others. United States v. Kaufman, 267 U.S. 408, 69 L.Ed 685, 45 S.Ct. 322. Thus it has already been determined that Federal tax liens will not prevail if at the time of the assessment, the property against

Also, Judge Weinstein was without authority because based on a contingent fee contract authorized by the State of New York[14] for the payment of services provided in the All Funds Case, which became perfected on entry of the final judgement on August 5, 1992, the Limited Partnerships' counsel of record had a superior attorney's lien to that of the United States, 26 U.S.C. § 6322(8).[15]

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which the lien is asserted no longer belongs to the taxpayer. United States v. Toys of World Club, Inc., 288 F.2d 89, 94 ALR 739 (2nd Cir. 1978).

[14]Judicial Law § 475, McKinney's Consolidated Laws of New York, Book 29. Attorneys lien in action, special or other proceedings.

From the commencement of an action, . . . the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds thereof **in whatever hands they may come** . . . . (emphasis added).

[15]A complaint for wrongful levy, abuse of process, and discrimination based on national origin was served on September 22, 1993, Isidoro Rodriquez, Esq. v. United States, CV-93-4141

Thus the supervisory power of this Court is sought because the entered final decision in the All Funds Case was disregarded by Judge Weinstein when he lacked power to due so, since he refused to comply with Rule 60 F.R.C.P.

(E.D.N.Y., Weinstein, J.). Judge Weinstein granted on November 11, 1993, an ex parte extension of time for the United States to respond, holding that the fact that administrative claims were filed in October, 1992, and February 1993, did not mean that the United States had to file within 60 days a response in accordance with the Federal Rules of Civil Procedures.

II. REVIEW BY THIS COURT IS SOUGHT BECAUSE THE SECOND CIRCUIT'S DECISION TO USE THE OLD 1968 DEFINITION OF "INTERCEPT" IN THE ALL FUNDS CASE, AND ITS FAILURE TO RENDER A DECISION IN THE INTERMEDIARY BANK CASE, HAVE DENIED THE LIMITED PARTNERSHIPS THEIR RIGHT TO RECEIVE DAMAGES FOR THE UNAUTHORIZED PROGRAMMING OF "STOP QUES" IN COMPUTER MODEMS, IN VIOLATION OF THE MANDATES OF CONGRESS IN THE ELECTRONIC COMMUNICATION PRIVACY ACT OF 1986.

The Second Circuit's decision to not issue a decision in the Intermediary Bank Case, and its decision in the All Funds Case, are in direct conflict with mandates of Congress regarding the enacted protection of "electronic communications" in transit and in computer storage, and the Limited Partnerships' right to damages.[16]

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[16]Senator Pat Leahy wrote to the then Attorney General on the issue of the protection of information in electronic communication. See Electronics Communications Privacy Act of 1986, Senate Report No. 99-541, October 17, 1986, p. 3557 (hereinafter "Senate Report"). See House Report No. 99-647, June 19, 1986, Committee on the Judiciary, 99th Congress (hereinafter "House

Prior to 1986, Congress and others were concerned that modern communication modes, and their future development, such as electronic fund transfers and other computer messaging, were constitutionally less confidential than older methods.

There were three Fourth Amendment arguments that were advanced to justify warrantless searches of computer messages, or records thereof, under the control of a third-party computer service provider:

1. The user disclosed their messages to the third party, as the custom-

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Report"). The Senate Report, p. 3555, states, "[t]he Electronic Communications Privacy Act amends title III of the Omnibus Crime Control and Safe Streets Act of 1968-the Federal wiretap law-to protect against the unauthorized interception of electronic communications. The bill amends the 1968 law to update and clarify Federal privacy protection and standards in light of dramatic changes in new computer and telecommunications technologies."

er in United States v. Miller, 425 U.S. 435 (1976), who disclosed his financial information to the bank, and thereby assumed the risk that the third party would disclose them to the government.

2. The third party's ability to access the user's messages deprived the user of any legitimate expectation of privacy, as happened in Smith v. Maryland, 442 U.S. 735 (1979).

3. The third party has power to consent to a search because it has "concurrent authority" over the records, as happened in United States v. Matlock, 415 U.S. 164 (1974).

For this reason, Congress amended Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 et seq., by enacting the Electronic Communications Privacy Act of

1986, 18 U.S.C. §§ 2510 et seq., and §§ 2701 et seq., to clarify the existence of and limits to the confidentiality rights of electronic messages.

The amendments accomplish the following:[17]

i. forbids the intentional and unauthorized interception of an electronic communication in transmission, and the knowing disclosure or use of a communication so intercepted. 18 U.S.C. § 2511(1)(a) and (c);

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[17]In short the Electronic Communications Privacy Act, mooted arguments (1) and (2) above (insofar as they pertain to private messages in transit and short term records thereof) but left number (3) largely intact, if certain requirements were met. See Chapter 19, Confidentiality and Control of Data, at p. 361 to p. 386, of Benjamin Wright, The Law of Electronic Commerce EDI, Fax, and E-mail: Technology, Proof, and Liability, November, 1991, Little, Brown and Company; See also Note, Search Warrants and Computer Records, 67 B.U.L. Rev. 179 (1987).

ii. prohibits a "public" communications service provider from intentionally and illegitimately disclosing an electronic message in transmission. 18 U.S.C. § 2511(3)(a);[18]

iii. regulates access by both the federal and state governments to stored electronic messages and service providers transactional records. 18 U.S.C. §§ 2703(a); and

iv. outlaws the intentional, unauthorized access of an electronic communication service, which access leads to the obtaining or tampering of stored messages. 18 U.S.C. § 2702(a).

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[18]Under the Federal Communications Act of 1934, 47 U.S.C. § 605 (1988), the ability of a communication provider from divulging messages is also prohibited

Despite the protection which Congress specifically enacted for "electronic communication," the Second Circuit denied the Limited Partnerships' claim for damages in the All Funds Case, based on the approving of the use of general in rem warrants (App. 33b), general DEA administrative subpoenas (App. 54b), and verbal orders issued by low level Department of Justice employees (App. 35b), to procure the interception and disclosure of in transit electronic communication; and approving the disclosure of electronic communication information in computer storage of the Limited Partnerships.

To avoid the Congressional mandate regarding the protection of electronic communications, the Second Circuit utilized in its All Funds Case decision the

limited old 1968 definition of "intercept," and disregarded Congress' specifically in 1986 amending the definition in 18 U.S.C. § 2510(4), so to protect electronic communications. Based on the limited 1968 definition of "intercept," the Second Circuit held that no "device" was used to "intercept," and thereby disregarded the admissions of the programming of "stop ques" in computer modem devices[19] to acquire access to all the in transit electronic fund transfers to the Republic of Colombia, including those of the Limited Partnerships.

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[19]A `modem,' (modulator/demodulator), has been defined as ". . . a device used to permit communications between computers at different sites, or between a computer and remote terminal, by converting binary digital computer data into analog signals which can pass over telephone lines. Rixon, Inc. v. Racal-Milgo, Inc., D.C. Del, 551 F.Supp. 163, 169." Vol 27, Words and Phrases, Permanent Edition, West Pub. 1989 Supp. Thus under 18 U.S.C. § 2510(5), a device was used by the Intermediary Banks at the request of the United States.

More interestingly, as well as far more troubling, was the Second Circuit's total ignoring of the specific Congressional prohibitions against "disclosure" contained in 18 U.S.C. § 2511(1)(a), (c), and (3)(a); § 2702(a).

By ignoring these and other statutory prohibitions, the Second Circuit assumed away the admitted use of only the verbal order issued by the two low level employees of the United States to acquire access to the electronic communication information in computer storage for less than 180 days belonging to the Limited Partnerships without any compliance with 18 U.S.C. § 2516(3), and § 2703(a)[20].

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[20]Under 18 U.S.C. § 2703(a), access to information of electronic funds transfer communication contained in computer storage at the Intermediary Bank for one hundred and eighty days or less can only be obtained through a judicial

In summary the Electronic Communication Privacy Act of 1986, 18 U.S.C. § 2510 et seq., and § 2701 et. seq., were enacted to prevent the interception "or other acquisition,"[21] of the contents of electronic funds transfer communications in transit or computer storage,[22] and to clarify the existence of and limits to the confidentiality rights of electronic messages in transit and computer stor-

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warrant issued under the Federal Rules of Criminal Procedure.

[21]Prior to the 1986 amendments, the term "intercept" was limited to the "aural acquisition," with the enactment of the 18 U.S.C. § 2510(4), Congress sought a "fair balance between the privacy expectations of citizens and the legitimate needs of law enforcement." House Report at p. 19.

[22]A "wire transfer" or "electronic funds transfer communications" are the transmittal of financial information between banks vis computer or other electronic messages. Because Fedwire, CHIPS, and SWIFT systems are communication service providers, electronic funds transfers in transit and storage on these systems are protected communications under 18 U.S.C. § 2516(3), and § 2703(a). See also House Report at p. 23.

age, vis-a-vis the Government[23] and the Intermediary Banks, as electronic communication service providers.[24]

Despite the Congress' mandate to protect "electronic communication in

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[23]The Department of Justice, in support of the enactment of the Electronic Communications Privacy Act, wrote to Congress to confirm that for three years following its enactment the level of authority required to permit the request in 18 U.S.C. § 2516(3), would be the same senior official level as 18 U.S.C. § 2516(1)(i.e. Deputy Assistant Attorney General of Criminal Division or higher). Furthermore, the Department of Justice promised Congress to inform them of any change in this policy. Senate Report at p. 3682 ; House Report at p. 51.

[24]"The purpose of the legislation is to . . . to prohibit the interception of certain electronic communications; to provide procedures for the interception of electronic communications by federal law enforcement officers; to provide procedures for access to communications records by federal law enforcement officers; to provide procedures for federal law enforcement access to electronically stored communications; and to ease certain procedural requirements for interception of wire communications by federal law enforcement officers." House Report, at p.16.

"In the absence of market discipline, there is no presumption that the government will strike an appropriate balance between disclosure and confidentiality. And the enormous power of the government makes potential consequences of its snooping far more ominous than those of . . .private individual or firm." (emphasis added) House Report at p. 19.

both the All Funds Case, and the Intermediary Bank Case, Judge Weinstein denied that the Limited Partnership could have any claim for damages against the United States and the Intermediary Banks for violation of the 18 U.S.C. § 2516(3) and § 2703(a), based only on the relation back doctrine (App. 45a-47a)

Although in the All Funds Case decision, the Second Circuit did reject this use of the relation back doctrine based on this Court's holding in United States v. 92 Buena Vista Avenue, 113 S.Ct 1126 (1993) (hereinafter "92 Buena Vista Avenue"),[25] the Second Circuit ,

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[25]In 92 Buena Vista Avenue, this Court held that,

". . . [i]f the Government wins a judgment of forfeiture . . . the vesting of its title in the property relates back to the moment when the property became forfeitable. **Until the Government does win such a judgment, however, someone else owns the property. That person may therefore invoke any defenses available to the owner of the property before the forfeiture is decreed.**

the Court of Appeals held that the Electronic Communication Privacy Act did not apply to permit any claim for damages because the Second Circuit found (although no discovery had been permitted, and the admissions of the programming of "stop ques" in the Intermediary Banks' computer modem devices), that no "device" was used by the United States to intercept the electronic funds transfer in transit 18 U.S.C. § 2510(4) (App. 61b-63b).

Apart from the obvious Fourth and Fifth Amendment due process concerns raised by the Second Circuit making findings when no discovery had been permitted, the Second Circuit decision

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. . . The Government cannot profit from the common-law doctrine of relation back until it has obtained a judgment of forfeiture. (Emphasis added) Id. at p. 1136.

in the All Funds Case, is in error because:

first, by focusing on the old limited 1968 definition of the term "intercepts," the Second Circuit intentionally disregarded the new expanded 1986 definition which Congress specifically enacted to amend 18 U.S.C. § 2510(4), to restrict the procuring of the interception of electronic communication in this new age of computer technology;

second, the Second Circuit totally ignored the admitted facts that based only on verbal order, and that without any judicial authority as required by 18 U.S.C. § 2516(3), and a warrant issued under the Federal Rules of Criminal Procedure, 18 U.S.C. § 2703(a), "stop ques' were programmed by the Intermediary Banks in their computer modem devic-

es to monitor and acquire access to all electronic fund transfer communications going to the Republic of Colombia.

third, Second Circuit totally ignored the prohibition in 18 U.S.C. § 2511(1)(a), against one who "procures any other person to intercept" an electronic communication;

fourth, the Second Circuit totally ignored the prohibition against a person or entity who "intentionally discloses, to any person the contents of any electronic communication" in 18 U.S.C. § 2511(1)(c);

fifth, the Second Circuit totally ignored the statutory prohibition against "a person or entity providing an electronic communication service to the public shall not intentionally divulge

the contents of any communication" in 18 U.S.C. § 2511 (3)(a); and,

sixth, totally ignored the statutory prohibition against an "entity providing an electronic communication service to the public [who] knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service," 18 U.S.C. § 2702(a).

However in the Intermediary Bank Case, the Second Circuit cannot assume away the very admissions of the United States and the Intermediary Banks submitted in their affidavits in support of their F.R.C.P. Rule 12(b)(6) Motion.

The admitted fact in both appeals is that without a warrant issued under the Federal Rules of Criminal Procedure as required under 18 U.S.C. § 2516(3),

and § 2703(a), every single electronic funds transfer going to the Republic of Colombia, including the Limited Partnerships were intercepted and disclosed to the United States. Thus under 18 U.S.C. § 2520 and § 2707, the Limited Partnerships have established a right to damages.

Thus this Petition to review the Intermediary Bank Case before the issuance of a judgement by the Second Circuit is justified, due to the Second Circuit already having decided in the All Funds Case to condone the United States and the Intermediary Banks intentional repeated disregard of the provisions of the Electronic Communication Privacy Act, and thereby deny the Limited Partnership their right to damages.

It is for this reason that this Petition presents issues of imperative public importance already addressed by Congress, but which the Second Circuit refuses to follow, so that deviation from normal appellate practice is required so to permit review and settlement in this Court.

III. REVIEW BY THIS COURT IS SOUGHT BECAUSE THE SECOND CIRCUIT'S DECISION IN THE ALL FUNDS CASE, AND ITS FAILURE TO RENDER A DECISION IN THE INTERMEDIARY BANK CASE, HAVE DENIED THE LIMITED PARTNERSHIPS THEIR RIGHT TO RECEIVE DAMAGES UNDER THE RIGHT TO FINANCIAL PRIVACY ACT OF 1978.

The Intermediary Banks have admitted that they had placed the funds relating to each intercepted electronic funds transfer in an account in the name of a beneficiary (Lod. 5).

Also the Intermediary Banks admit to being compensated by the United States under the provisions of the Right to Financial Privacy Act, for the expenses they incurred in their collaboration (Lod. 14).

Despite these admitted facts, and the fact that discovery was barred by the District Court, the Second Circuit held in the All Funds Case, that 12

U.S.C. § 3403(a), is not applicable because the Limited Partnerships are not "customers" of the Intermediary Banks.

The Limited Partnerships argue that liability does exist under the Right to Financial Privacy Act not only because the Intermediary Banks admitted that they placed the intercepted electronic fund transfers in a "stop que" account in their computer storage;[26] but also because the Intermediary Banks were compensated for the expenses relating to their collaboration under the Right to Financial Privacy Act.

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[26]The accounts had to be setup in accordance with the regulations of the Fedwire, SWIFT, and CHIPS systems. Said regulations requires that each electronic funds transfer which is delayed be maintained in a separate and distinct account apart from all others transfers. Also the spurious inference in the Second Circuit's opinion that the Limited Partnerships are not "partnerships" for purposes of the act disregards the Republic of Colombia Civil Code, and Section 101(7) of the Uniform Limited Partnership Act.

Because of the above admissions this Court should grant this Petition for Writ of Certiorari to assure that the mandates of Congress are followed.

IV. THE INTERMEDIARY BANK CASE APPEAL OF THE DENIAL OF THE LIMITED PARTNERSHIPS' RIGHT TO DAMAGES WARRANTS REVIEW AT THIS TIME BECAUSE THE SECOND CIRCUIT HAS ALREADY DECIDED IN THE ALL FUNDS CASE TO CONDONE THE UNITED STATES AND INTERMEDIARY BANKS' DISREGARD OF THE PROVISIONS OF THE ELECTRONIC COMMUNICATION PRIVACY ACT AND RIGHT TO FINANCIAL PRIVACY ACT.

In support of their motion to dismiss under Rule 12(b)(6), the United States and the Intermediary Banks admitted that between July 16, 1990, and August 8, 1990, Messrs. Hui and Brown, without any judicial authority required under 18 U.S.C. § 2516(3) and § 2703(a), did instruct the Intermediary Banks to:

(i) program "stop ques" in their computer modem devices, and to not com-

ply with any accepted wire transfer instructions contained in any wire transfer going to the Republic of Colombia;

(ii) permit repeated unauthorized disclosure of accepted wire transfer instructions in transit to the Republic of Colombia, and in computer storage; and,

(iii) place into a "stop que" account at their respective banks the information related to intercepted wire transfer communications.

Despite these admissions of programming of "stop ques," and the repeated "disclosure" of electronic communication information by the Intermediary Banks,[27] the Second Circuit in the All

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[27]The Senate Report at p. 3580. stated that, ". . . the Electronic Communications Privacy Act amends existing section 2520 of title 18 of the United States Code to incorporate violations involving . . . , **disclosure** . . . of . . . electronic communications.

Funds Case, denied the Limited Partnerships' claim for damages.

However from the admitted facts liability of the United States and the Intermediary Banks exists because they did exactly what was specifically prohibited.

Consequently, because of the importance of the issues involved given the admissions of the United States and Intermediary Bank, the Second Circuit's decision in the All Funds Case, and its not issuing a decision in the Intermediary Bank Case, the Court is requested to exercise its power of supervision to consider the Intermediary Bank Case.

CONCLUSION

Through the use of only self executing general in rem warrants, general DEA administrative subpoenas, and verbal telephone orders, the United States and The Drug Enforcement Administration, did knowingly procure the collaboration of The Bank of New York and Banco Atlantico, in the programming of "stop ques" in their communication computer modem devices, so to acquire access to the information in the electronic funds transfer communications of the Limited Partnerships, and disclose the Limited Partnerships' electronic communication information in computer storage.

Because these activities violated the protection given by Congress to "electronic communications" and "finan-

cial information," the Limited Partnerships have stated a claim for damages.

However, in the All Funds Case, due to the Second Circuit's conflicting policy position from that of the legislation enacted by Congress, the Second Circuit refused to permit the Limited Partnerships' claims for damages.

The Second Circuit justified its position by finding, although no discovery was permitted in the lower court on the issue of intercept and "disclosure", that a "device" was not used by the United States to "intercept," the Limited Partnerships' electronic communication.

The Second Circuit's decision is not only in serious error, but more disturbingly is drafted to totally disregard the statutory language Congress

specifically enacted in 1986 to protect electronic communication, because:

(a) the Second Circuit used the invalid 1968 definition of "intercept," and did not use the expanded definition of intercept as enacted in 1986 by Congress in 18 U.S.C. § 2510(4) and (5);

(b) the Second Circuit ignored totally the Congressional requirement under 18 U.S.C. § 2516(3), that judicial authorization be obtained in conformity with 18 U.S.C. § 2518, prior to permitting the acquiring of the contents of electronic communication;

(c) the Second Circuit ignored totally the unauthorized procuring the disclosure of in transit electronic communications, 18 U.S.C. § 2511(1)(a), (c), and (3)(a);

(d) the Second Circuit ignored totally the prohibition to permitting any access to electronic communication information in computer storage for less than 180 days unless a warrant has been issued under the Federal Rules of Criminal Procedure 18 U.S.C. § 2703(a); and,

(e) the Second Circuit ignored the fact that although "stop que" accounts had been established, the financial information was disclosed without obtaining authorization, 12 U.S.C. § 3403(a).

This willingness of the Second Circuit to look the other way when there are repeated admitted violations of federal statutes, so to deny a right to recover for damages of the Limited Partnerships, brings to mind the following colloquy which has been attributed to the great Chancellor, Sir Thomas More:

Roper: So! Now you give the Devil benefit of law!

More: Yes. What would you do, cut a great road through the law to get after the Devil?

Roper: Yes! I'd cut down every law in England to do that!

More: Oh? And when the last law was down and the Devil turned round on you, where would you hide, Roper, the laws all being flat?

* * *

Yes, I give the Devil benefit of law for my own safety's sake.

Robert Bolt, "A Man for All Season."

Whether or not the words be the historical More's or only the playwright's, the insight is both profound, and serves as the foundation for requesting this Court to issue a writ of certiorari to the Second Circuit.

The two appeals must be reviewed by this Court not only to reverse the lower courts so to rein in their misguided en-

thusiasm to use the forfeiture laws to hack that great road through legislation enacted by Congress to protect electronic communications; but also to provide supervisory guidance to the federal courts in the enforcement of the Electronic Communication Privacy Act and the Right to Financial Privacy Act; as well as Rule 60(b) of the Federal Rules of Civil Procedure.

Respectfully submitted,

ORGANIZACION JD LTDA., AND
MANUFACTURAS JD LTDA.

By: Isidoro Rodriguez
Isidoro Rodriguez, Esq.

Attorney for Petitioners
Law Offices of Isidoro Rodriguez, P.C.
Calle 84, No. 56-51
Barranquilla, Colombia
(011)57-58-561678/458273